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IN THE SUPREME COURT OF THE UNITED STATES.

Miscellaneous No. 108, October Term 1949.

GRACE W. ADKINS AS ADMINISTRATRIX OF THE ESTATE OF P. V. ADKINS, DECEASED, *Petitioner,*

vs.

E. I. DU PONT DE NEMOURS & COMPANY, INC., *Respondent;*

THE UNITED STATES OF AMERICA, *Intervener.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Grace W. Adkins as administratrix of the estate of P. V. Adkins, deceased, will be hereinafter referred to as petitioner, and E. I. du Pont de Nemours & Company will be referred to as respondent.

The petitioner is seeking to have this Court grant a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review a decision of that court in this cause filed on August 8, 1949, as No. 3866. A true and correct copy of the opinion of the United States Court of Appeals for the Tenth Circuit in this cause is appended hereto marked "Appendix A" and made a part hereof.

The essential facts out of which this controversy arose are as follows: Respondent was employed by the United States to construct and operate a munitions plant, known as the Oklahoma Ordnance Works, near Pryor, Oklahoma. The contract between the United States and respondent was written, and a copy was attached to and made a part of the answer and filed by respondent in the United States District Court for the Northern District of Oklahoma where this cause was originally filed by the plaintiffs on May 17, 1946. Plaintiffs sought through their agent, P. V. Adkins, to recover compensation for alleged overtime, penalties, attorneys' fees and costs, under the Fair Labor Standards Act of 1938 (29 F. C. A., Sections 201-219, as amended 40 F. C. A., following Section 326), and Executive Order No. 9240. During the pendency of this action P. V. Adkins died and Grace W. Adkins, as administratrix of his estate, was substituted as party plaintiff. On June 25, 1946, plaintiffs filed an amendment to their complaint, which, in effect, simply made the complaint more definite and certain (R. 2-10). To this complaint and amendment defendant, on July 29, 1946, filed its answer in which it set up various and sundry defenses to the alleged cause of action set forth in the complaint and amendment thereto (R. 10-15). To its answer defendant attached a copy of its contract, together with supplements thereto, between it and the Federal Government through the War Department.

The issues being thus made up the case was assigned for trial and referred to a special master by the trial court to hear evidence, make his findings of fact, conclusions of law and recommendations thereon. The special master heard the evidence, made his findings of fact, conclusions of law and recommendations thereon, in which he recommended that the claims be denied on the ground of the doctrine of

de minimis non curat lex, and that respondent complied fully with Executive Order No. 9240. Both petitioner and respondent filed their exceptions to the report of the special master, and while these were pending in the trial court, but undetermined, the Congress passed the Portal-to-Portal Act of May 14, 1947 (29 F. C. A., Sections 251-262).[1]

After the passage of the Portal-to-Portal Act of 1947 the respondent filed an amendment to its answer wherein it pleaded the Portal-to-Portal Act in bar of any claims of the petitioner, and prayed that all claims of the petitioner be denied and dismissed at her cost (R. 333). Petitioner thereupon filed a motion in the trial court in which she raised the constitutionality of the Portal-to-Portal Act of 1947 (R. 328-333). The constitutionality of the Portal-to-Portal Act having been attacked, the United States asked to be permitted to intervene on the question of the constitutionality of the said Act (R. 334). The application of the Federal Government to intervene was permitted and it then asserted that the Portal-to-Portal Act was constitutional (R.

1. The pertinent portions of the Act are as follows:

"252 (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or * * *."

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

336). Petitioner interposed objection to the intervention of the Federal Government but the same was overruled (R. 338).

The constitutionality of the Portal-to-Portal Act was briefed at length and argued before Honorable Royce H. Savage, as District Judge. The trial court, after being fully advised in the premises and having read and studied the written briefs submitted and oral arguments on the constitutionality of the said Portal-to-Portal Act, on September 24, 1947, held the Portal-to-Portal Act constitutional and dismissed petitioner's complaint together with the amendment thereto.

For the convenience of the Court, omitting the caption, we quote the order of dismissal as follows:

> "This cause coming on for hearing before me, Royce H. Savage, judge of the said court, on this the 24th day of September, 1947, for hearing on objections to master's report and application to modify and confirm report, and on objections to the constitutionality of the Act of Congress known as the Portal-to-Portal Act of 1947, and the plaintiffs appearing by their attorneys, Porter & Porter, by John W. Porter, Jr., and by Fred W. Martin, and the defendant appearing by its attorneys, Peter B. Collins of Wilmington, Delaware, and Spillers, Spillers & Voorhees of Tulsa, Oklahoma, and the United States appearing by Whit Y. Mauzy, United States District Attorney; and the court having heard the argument of counsel and being advised in the premises finds that the Act of Congress known as the Portal-to-Portal Act of 1947 is constitutional, and that this court under and by virtue of the terms of the said Act has no jurisdiction to pass upon the further matters involved in controversy in this cause, and that this cause should be dismissed for want of jurisdiction, to which the plaintiffs object and except.

"It is therefore considered, ordered, adjudged and decreed by the court that this cause be and the same is hereby dismissed at the cost of the plaintiffs, to which the plaintiffs except.

"Dated this 24th day of September, 1947.

/s/ Royce H. Savage, Judge." (R. 346)

It will be noted that the trial judge first held the Portal-to-Portal Act constitutional and then held further that by virtue of the terms of the said Act that the trial court had no jurisdiction to pass upon further matters involved in controversy and dismissed the cause for want of jurisdiction.

Petitioner filed no application with the trial court to vacate the order of September 24, 1947, entered by Judge SAVAGE dismissing the cause, but thereafter, on October 3, 1947, filed a motion for a new trial (R. 348-352).

On October 8, 1947, petitioner filed her motion to amend her pleadings to conform to the evidence by alleging, in effect, that the contract between the United States and the respondent was for the use and benefit of petitioner and those for whom she prosecuted the action, and that respondent agreed and contracted to pay plaintiffs for all time they were required to be on duty or to be at a prescribed place of work and likewise for taking baths (R. 354). For the convenience of the Court, omitting the caption, we here set out this motion:[2]

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2. "Comes now the plaintiff, Grace W. Adkins, Administrator, and respectfully prays this Honorable Court to grant her authority to amend the pleadings herein to conform to the evidence, and moves the Court to consider said pleadings amended to conform to the evidence, including the following particulars, to-wit:

"That plaintiff's complaint be amended to include the allegation that defendant entered into the written contract set out and attached to defendant's answer, and particularly that provision wherein defendant agreed with the United States and for the use and benefit of all employees, laborers and mechanics engaged in perform-

It should be noted here that the case was formally dismissed by the trial court on September 24, 1947, for want of jurisdiction of the trial court to hear and determine the issues raised by the pleadings (R. 346). The trial court denied the application to amend because, as stated by the trial court, "The court being well and sufficiently advised in the premises finds that the motion comes too late." This order was entered on October 8, 1947 (R. 355).

From the order of dismissal and the refusal of the trial court to permit an amendment to the pleadings, allegedly to conform to the evidence introduced before the special master, petitioner appealed to the United States Court of Appeals for the Tenth Circuit.

We again call the Court's attention to the fact that the complaint and amendments are based squarely and solely upon the Fair Labor Standards Act of 1938, as amended, and Executive Order No. 9240 issued by the President of the United States.

Petitioner sought to appeal this cause from the United States District Court for the Northern District of Oklahoma to the United States Court of Appeals for the Tenth Circuit *in forma pauperis*. Difficulties were encountered by petitioner and this Court granted a petition for writ of certiorari to review certain questions concerning appeals *in forma pauperis* and reversed both the United States Court of Appeals for the Tenth Circuit and the trial court

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ing said contract to pay time and one-half the basic rate of pay for all hours worked in excess of 8 hours in any one calendar day, or 40 hours in any one week.

"That plaintiff's complaint be further amended to include the allegation that said defendant agreed and contracted to pay said employees for all time during which an employee was required by said defendant to be at duty, or to be on the employer's (defendant's) premises, or to be at a prescribed work place, and also, where baths were required, that time consumed bathing and changing clothes was compensatable."

on the interpretation of the statutes concerning appeals *in forma pauperis*. *Adkins* v. *Du Pont*, 335 U. S. 331, 93 L. ed. 65.

This cause was then remanded to the trial court for further proceedings not inconsistent with the opinion of this Court in *Adkins* v. *Du Pont, supra*. The trial court permitted the appeal *in forma pauperis*, but limited the record in certain respects. The petitioner then filed a motion in the United States Court of Appeals for the Tenth Circuit seeking to have the entire record sent up, including the testimony taken before the special master, the findings of fact, conclusions of law and recommendations of the special master, and objections thereto, which had never been passed on in any manner by the trial court. It will be recalled from a careful reading of the order of dismissal that the trial court first held the Portal-to-Portal Act constitutional, and then in turn held that the trial court had no jurisdiction to proceed further and dismissed the action for want of jurisdiction. Those were the questions passed upon by the trial court.

The United States Court of Appeals for the Tenth Circuit heard arguments on the motion of the petitioner and respondent, and thereupon stated that if at the final argument of the cause before the United States Court of Appeals for the Tenth Circuit that court deemed any additional part of the record material which had not been included, that it would require that any such part or portion of the record be sent up for the consideration of the United States Court of Appeals for the Tenth Circuit. That court made no order requiring additional portions of the record to be sent up. The cause was briefed in the United States Court of Appeals and regularly set for oral argument before that court at Oklahoma City. Counsel for petitioner appeared but de-

clined to make an oral argument. Counsel for respondent argued the cause orally before the United States Court of Appeals for the Tenth Circuit. Thereafter the United States Court of Appeals for the Tenth Circuit, speaking through Judge HUXMAN, Circuit Judge, rendered an opinion and filed the same August 8, 1949, affirming the judgment of the trial court. (Appendix A.)

Petitioner now seeks to have this Court grant a petition for writ of certiorari to review the action of the United States Court of Appeals in affirming the judgment of the trial court.

ARGUMENT.

We have examined the petition for certiorari and the brief submitted by counsel for petitioner on the constitutionality of the Portal-to-Portal Act of 1947, and as it appears to us from a careful analysis of these documents the petition is wholly without merit, and upon the following grounds should be denied:

I.

The Portal-to-Portal Act of May 14, 1947, (29 F. C. A., 251, 268) is constitutional.

II.

The trial court did not err in denying application of petitioner to amend after the cause had been dismissed in the trial court.

III.

The complaint and amendments thereto fail to state facts sufficient to constitute a cause of action under Executive Order 9240.

IV.

Executive Order No. 9240 conferred no jurisdiction on the United States District Courts to adjudicate claims based thereon.

We will discuss these propositions in the order named.

I.

The Portal-to-Portal Act of May 14, 1947, (29 F. C. A., 251-268) Is Constitutional.

As we have heretofore noted, the constitutionality of the Portal-to-Portal Act of 1947 was sustained by Judge Royce H. Savage, of the United States District Court for the Northern District of Oklahoma, in this cause on September 24, 1947. Subsequently, numerous District Courts of the United States have sustained the constitutionality of the Act.[3]

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3. Ackerman v. J. I. Case Co., (D. C. E. D. Wis. 1947) 74 F. Supp. 639; Adkins v. E. I. du Pont de Nemours & Co., (D. C. N. D. Okl. 1947) 13 CCH Labor Cases, par. 64,025; Alameda v. Paraffine Cos., Inc., (D. C. N. D. Cal. 1947) 75 F. Supp. 282; Baboine v. Pure Oil Co., (D. C. N. D. Ohio 1948) 16 CCH Labor Cases, par. 64,922; Blessing v. Hawaiian Dredging Co., (D. C. D. C. 1948) 76 F. Supp. 556; Boehle v. Electro Metallurgical Co., (D. C. D. Or. 1947) 72 F. Supp. 21; Bumpus v. Remington Arms Co., (D. C. W. D. Mo. 1947) 74 F. Supp. 788; Burfeind v. Eagle-Picher Co. of Texas, (D. C. N. D. Tex. 1947) 71 F. Supp. 929; Cardinale v. General Motors Corp., (D. C. N. D. N. Y. 1947) 76 F. Supp. 743; Cochran v. St. Paul & Tacoma Lumber Co., (D. C. W. D. Wash. 1947) 73 F. Supp. 288; Darr v. Mutual Life Insurance Company, (D. C. S. D., N. Y. 1947) 72 F. Supp. 752; Elting v. North American Aviation, Inc., (D. C. D. Kan. 1947) 13 CCH Labor Cases, par. 64,154; Ferrer v. Waterman Steamship Corp., (D. C. D. Puerto Rico 1948) 76 F. Supp. 601; Fisch v. General Motors Corp., (D. C. E. D. Mich. 1948) 76 F. Supp. 178; Grazeski v. Federal Shipbuilding & Dry Dock Co., (D. C. D., N. J. 1948) 76 F. Supp. 845; Hart v. Aluminum Co. of America, (D. C. W. D. Pa. 1947) 73 F. Supp. 727; Holland v. General Motors Corp., (D. C. W. D., N. Y. 1947) 75 F. Supp. 274; Hollingsworth v. Federal Mining & Smelting Co., (D. C. D. Idaho 1947) 74 F. Supp. 1009; Hornbeck v. Dain Mfg. Co., (D. C. S. D. Iowa 1947) 7 F. R. D. 605; Jackson v. Northwest Airlines, Inc., (D. C. D. Minn. 1948) 76 F. Supp. 121; Johnson v. Park City Consolidated Mines Co., (D. C. E. D. Mo. 1947) 73 F. Supp. 852; Lasater v. Hercules Powder Co., (D. C. E. D. Tenn. 1947) 73 F. Supp. 264; Lassiter v. Atkinson Co., (D. C. N. D. Wash. 1948) 7 W. D. Cases 816; Lee v. Hercules Powder Co., (D. C. W. D. Wis. 1948) 15 CCH Labor Cases, par. 64,700; Local 626 Interational Union Unitel Auto,

A large number of these cases went to various United States Courts of Appeals and there the constitutionality of the Portal-to-Portal Act was uniformly sustained.[4]

In eight of these cases petitions for writs of certiorari were filed with this Court and denied.[5]

All courts which have had the constitutionality of the

Aircraft and Agr. Implement Workers of America v. General Motors Corp., (D. C. D. Conn. 1947) 76 F. Supp. 593; Lockwood v. Hercules Powder Co., (D. C. W. D. Mo. 1948) 78 F. Supp. 716; McDaniel v. Brown & Root, Inc., (D. C. E. D. Okl. 1948) 14 CCH Labor Cases, par. 64,511; May v. General Motors Corp., (D. C. N. D. Ga. 1947) 73 F. Supp. 878; Moeller v. Eastern Gas & Fuel Associates, (D. C. D. Mass. 1947) 74 F. Supp. 937; Plummer v. Minneapolis-Moline Power Implement Co., (D. C. D. Minn. 1948) 76 F. Supp. 745; Quinn v. California Shipbuilding Corp., (D. C. S. D. Cal. 1947) 76 F. Supp. 742; Reid v. Day & Zimmerman, Inc., (D. C. S. D. Iowa 1947) 73 F. Supp. 892; Redwitz v. Ford Motor Co., (D. C. W. D. Ky. 1948) 80 F. Supp. 265; Reynolds v. Rogers Cartage Co., (D. C. W. D. Ky. 1947) 71 F. Supp. 870; Sadler v. W. S. Dickey Clay Mfg. Co., (D. C. W. D. Mo. 1947) 73 F. Supp. 690; Role v. J. Neils Lumber Co., (D. C. Mont. 1948) 74 F. Supp. 812; Seese v. Bethlehem Steel Co., (D. C. Md. 1947) 74 F. Supp. 412; Smith v. American Can Co., (D. C. E. D. Ill. 1948) 8 F. R. D. 112; Smith v. Colorado Fuel & Iron Corp., (D. C. D. Colo. 1948) 15 CCH Labor Cases, par. 64,755; Smith v. Cudahay Packing Co., (D. C. D. Minn. 1947) 76 F. Supp. 575; Story v. Todd Houston Shipbuilding Corp., (D. C. S. D. Tex. 1947) 72 F. Supp. 690; Wan v. E. E. Black, Ltd., (D. C. D. Haw. 1948) 75 F. Supp. 553.

4. Battaglia v. General Motors Corp., (2d Cir. 1948) 169 F. (2d) 254; Darr v. Mutual Life Ins. Co., (2d Cir. 1949) 169 F. (2d) 262; Atallah v. D. H. Hubbert & Sons, (4th Cir. 1948) 168 F. (2d) 993; Seese v. Bethlehem Steel Co., (4th Cir. 1948) 168 F. (2d) 58; Fisch v. General Motors Corp., (6th Cir. 1948) 169 F. (2d) 266; Rogers Cartage Co. v. Reynolds, (6th Cir. 1948) 166 F. (2d) 317, 3 A. L. R. (2d) 1090; Lasater v. Hercules Powder Co., (6th Cir. 1948) 171 F. (2d) 263; Lee v. Hercules Powder Co., (7th Cir. 1949) 171 F. (2d) 950; Potter v. Kaiser Co., Inc., (9th Cir. 1949) 171 F. (2d) 705; Role v. Neils Lumber Co., (9th Cir. 1949) 171 F. (2d) 706; McDaniel v. Brown & Root, Inc., (10th Cir. 1949) 172 F. (2d) 466; Newsom, et al., v. E. I. du Pont de Nemours & Co., (6th Cir.) 173 F. (2d) 856; Thomas v. Carnegie-Illinois Steel Corp., 174 F. (2d) 711, and 14 other cases consolidated; Adkins v. E. I. du Pont de Nemours & Co., (the case at bar, not yet officially reported).

5. Battagalia (Holland, Hilger, Casheba) v. General Motors Corp., (4 cases) (2d Cir. 1948) 169 F. (2d) 254, certiorari denied (4 cases) (1948) 335 U. S. 887, 69 S. Ct. 23; Darr v. Mutual Life Ins. Co., (2d Cir. 1948) 169 F. (2d) 262, certiorari denied 1948, 335 U. S. 871, 69 S. Ct. 166; Atallah v. B. H. Hubbert & Sons, (4th Cir. 1948) 168 F. (2d) 993, certiorari denied sub nom Cingrigani v. B. H. Hubbert & Sons, (1948) 335 U. S. 868, 69 S. Ct. 138; Fisch v. General Motors Corp. and Bateman v. Ford Motor Co., (2 cases) (6th Cir. 1948) 169 F. (2d) 266, certiorari denied (2 cases) (1949) 335 U. S. 902, 69 S. Ct. 405.

Portal-to-Portal Act under consideration, so far as we have been able to ascertain, have sustained the constitutionality of the Act. This Court has denied petitions for writs of certiorari in every case so far passed to this Court to review the action of any United States Court of Appeals sustaining the constitutionality of the Portal-to-Portal Act.

We believe that every ground on which the Portal-to-Portal Act of 1947 has been attacked as unconstitutional is covered in the opinions hereinabove referred to. The opinions in the case of *Battagalia* v. *General Motors Corp.*, (2nd Cir., 1948) 169 F. (2d) 254, and *Fisch* v. *General Motors Corp.*, *Bateman* v. *Ford Motor Co.*, (6th Cir., 1948) 169 F. (2d) 266, and *Thomas, et al.*, v. *Carnegie-Illinois Steel Corp.*, and 14 other cases, 174 F. (2d) 711, have given careful consideration to the constitutionality of the Portal-to-Portal Act of 1947. The reasoning of the distinguished judges who wrote the opinions in the *Battagalia* v. *General Motors Corp.* and *Fisch* v. *General Motors Corp.* cases have made a clear and concise analysis of the constitutionality of the Portal-to-Portal Act in its various essential phases and sustained it.

We submit that the Portal-to-Portal Act of 1947 is constitutional in all its aspects.

Counsel for petitioner has filed a separate memorandum attacking the constitutionality of the Portal to Portal Act. In this memorandum counsel for petitioner challenges the constitutionality of the Portal-to-Portal Act on four grounds. First, he says that before the trial court could pass upon the constitutionality of the Act it must have had before it complete findings of fact involved in the case at bar. In the series of cases referred to as *Battagalia, et al.*,

v. *General Motors Corp.*, 169 F. (2d) 254, *supra*, that court held:

> "It was the duty of the court to ascertain whether it had jurisdiction before proceeding to hear and decide the case on the merits. Federal Rules of Civil Procedure, Rule 12(h), 28 U. S. C. A., following Section 723c."

And likewise held:

> "Where complaints in employees' actions under the Fair Labor Standards Act stated no cause of action under subsequently passed Portal-to-Portal Act which employees asserted was unconstitutional, the constitutionality of the latter act was properly presented by motions to dismiss complaints for failure to state cause of action and for want of jurisdiction. Federal Rules of Civil Procedure, Rule 12(b, h), 28 U. S. C. A., following Section 723c; Portal-to-Portal Act of 1947, Secs. 1-13, 29 U. S. C. A., Secs. 251-262."

We deem it unnecessary to pursue this point further. There is no merit to the contention that the trial court in order to pass upon the constitutionality of the Act must have first passed upon all the facts which had been introduced or might have been introduced at the trial of the cause.

As to their second point, counsel for petitioner say that there was no lawful purpose for the enactment of the Portal-to-Portal Act of 1947. We assert that this proposition is wholly without merit. The Congress of the United States in order to regulate interstate commerce had the power to do whatever it deemed proper, so long as its actions were not capricious and were within constitutional limitations. This action, it will be recalled, was based squarely upon the Fair Labor Standards Act of 1938 as amended, and Executive Order No. 9240 issued by the Chief Executive. All the

alleged rights and claims which petitioner set up for the use and benefit of claimants were based on the Fair Labor Standards Act of 1938 and amendments thereto. If Congress gave the rights, it had a right to take them away. It is up to Congress to declare policies, not the courts. The judiciary may construe, but cannot determine the policies for the Congress.

In the case of *Seese, et al.*, v. *Bethlehem Steel Co., supra,* the court used this language:

> "The exercise by Congress of power to regulate interstate and foreign commerce is not invalidated by the fact that its effect is to destroy rights under valid existing contracts. U. S. C. A., Const., Art. 1, Sec. 8, Cl. 3."

There is no merit to the second point of attack on the constitutionality of the Portal-to-Portal Act.

As their third point counsel assert that the Portal-to-Portal Act of 1947 is unconstitutional as depriving petitioner of private property for public use without just compensation, in violation of the Fifth Amendment of the Constitution. Here again counsel's argument is directly contrary to the principles announced by the learned judges in the *Battagalia* and *Fisch* cases, *supra.* The authorities cited by petitioner are not in point, and there is no merit to this contention.

Counsel for petitioner in their Point 4 assert that the Portal-to-Portal Act of 1947 is unconstitutional because it creates a state of involuntary servitude as against petitioner and those for whom she prosecutes the action, in violation of the Thirteenth Amendment of the Federal Constitution. This Court, in the case of *Ex parte Wilson,* 5 S. Ct. 935, 941, 114 U. S. 417, 29 L. ed. 89, stated that the

Thirteenth Amendment to the Constitution which provides that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction, *means compulsory imprisonment at hard labor without pay.* (Emphasis ours.)

It is respectfully submitted that the Portal-to-Portal Act of 1947 is constitutional, and the argument of counsel for petitioner to the contrary is wholly without merit.

II.

The Trial Court Did Not Err in Denying Application of Petitioner to Amend After the Cause Had Been Dismissed in the Trial Court.

It will be recalled that on September 24, 1947 (R. 346) the trial court dismissed this action on the ground that the Portal-to-Portal Act is constitutional and ousted the trial court of jurisdiction to determine further matters in this cause, and thereupon dismissed this action at the cost of petitioner. Petitioner filed no motion to vacate or set aside the order of dismissal. Fourteen days after the dismissal of the cause, petitioner filed an application to amend to conform to the proof. The court denied the application to amend on the ground that the same came too late (R. 335). If the trial court was correct in holding that the Portal-to-Portal Act was constitutional and that the court under the Portal-to-Portal Act had no jurisdiction to adjudicate matters within the issues raised by the pleadings, and having dismissed the action for want of jurisdiction, it had no power to authorize an amendment to the complaint.

This phase of this cause is, we think, covered by an opinion of the Seventh Circuit Court of Appeals in the case

of *Bryan* v. *Smith, et al.*, 174 F. (2d) 212. We believe the reasoning is good and we here quote:

> "It is as if the suit had never been brought. 27 C. J. S., Dismissal and Nonsuit, Sec. 39; *Maryland Casualty Co.* v. *Latham*, 5 Cir., 41 F. (2d) 312. No steps can be taken upon the suit after dismissal. *Miller* v. *Mans*, 28 Ind. 194, 195. Any steps taken thereafter are a nullity. *Elston and Others* v. *Drake, in Error*, 5 Blackf. Ind. 540. The dismissal 'carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and of defendant, and all issues, with respect to plaintiff's claim.' 27 C. J. S., *supra*, Sec. 39."

Having no jurisdiction, the court could not permit an amendment after it had formally dismissed the cause without first having reinstated the cause on motion of the petitioner.

In our opinion there is no merit to the complaint of petitioner that the trial court erred in overruling her motion to amend (R. 354). The trial court in overruling this motion assigned as a reason therefor that it came too late (R. 355). This record discloses that the order of dismissal was entered on the 24th day of September, 1948 (R. 346). Since the court dismissed for lack of jurisdiction there was no case pending in the trial court at the date of the filing of the motion for leave to amend, October 8, 1947.

Judge HUXMAN, in the opinion for the United States Court of Appeals for the Tenth Circuit, in passing upon the question of whether the trial court committed error or abused its discretion in denying the amendment, used this language:

> "Appellants urge that the trial court erred in refusing permission to amend the complaint to conform

to the proof by alleging that the contract between the Government and DuPont was executed for their use and benefit.[3] The application to amend to conform to the proof was not made until October 8, 14 days after the court had dismissed the case. Amendments, after judgment, rest in the sound discretion of the trial court and may be properly denied when the moving party has been guilty of delay.[4]

"We cannot say that the trial court abused its discretion in denying the right to amend, 14 days after judgment. But in any event, the court ruled correctly on the motion even if such motion be considered on its merits. Appellant sought to amend by alleging that the contract between DuPont and the Government was made for their benefit. In this way they sought to bring themselves within the saving provision of Section 252 (a) (1) of the Portal-to-Portal Act. It has been held, without exception, that contracts such as the one in this case, are not contracts for the benefit of the employees so as to bring their services within the saving provisions of the Act."[5]

"3. This contract contained provisions with respect to minimum wages and maximum hours and provided penalties for the violation thereof.

"4. Maryland Casualty Co. v. Hosmer, 93 Fed. (2d) 365; Baker v. Barber Asphalt Paving Co., 92 Fed. 117; Alder v. Drudis, 170 P. (2d) 515; Moneta v. Hoinacki, 67 N. E. (2d) 204; Vaillancourt v. Dutton, 50 Atl. (2d) 762.

"5. Fisch v. General Motors Corporation, supra; Thomas v. Carnegie-Illinois Steel Corporation, supra."

Petitioner contends that she should have been permitted to amend by alleging that the contract between Du Pont and the Government was made for her benefit as petitioner, and thereby bring herself within the saving provisions of Section 252 (a) (1) of the Portal-to-Portal Act. This question has been passed on in two cases.

The United States Court of Appeals for the Sixth Circuit, in the cases of *Fisch, et al.*, v. *General Motors Corpo-*

ration and *Bateman, et al.*, v. *Ford Motor Co.*, 169 F. (2d) 266, used this language:

> "A contract by employers with the United States that employees would be paid at rate of time and one-half the regular rate for overtime work and that the employers would comply with all federal laws and regulations including the Fair Labor Standards Act and regulations issued thereunder, did not entitle employees to compensation irrespective of Fair Labor Standards Act and Portal-to-Portal Act, nor exempt employees from the provisions of the latter Act. Portal-to-Portal Act of 1947, Sec. 1, *et seq.*, 29 U. S. C. A., Sec. 251, *et seq.*; Fair Labor Standards Act of 1938, Sec. 1, *et seq.*, 29 U. S. C. A., Sec. 201, *et seq.*"

In the body of the opinion the court used this language:

> "The amendments to the complaints must be considered. As herein indicated, the amendments are grounded upon alleged contract or contracts between defendants and the United States under which defendants agreed to pay plaintiffs wages at the rate of time and one-half the regular rate for overtime work, as set up in the original complaints, and further agreed that they would comply with all federal laws and regulations, including the Fair Labor Standards Act and the regulations issued thereunder. Plaintiffs contend that the amendments aver a cause of action upon contract altogether independent of the Fair Labor Standards Act and the Portal-to-Portal Act. The amendments are vague and uncertain in their averments and are confusing because they were not set out in separate counts of the complaints but were incorporated as a part of the original complaints brought under the Fair Labor Standards Act. Taking the substance of the averments of the contracts as true, we cannot agree that they were entirely independent of the statutes involved. By the very terms of the agreements as alleged, the Portal-to-Portal Act, an amendment to the Fair Labor Standards Act, becomes a part of the contracts.

By the contracts defendants agreed to obey all federal laws. It is true enough that one may recover upon a contract to which he is not actually a party, if the contract was executed for and inured to his benefit. But Sec. 2(a) of the Portal-to-Portal Act did not except such a contract from its provisions. The only exception made was, '(1) An express provision of a written or nonwritten contract in effect, at the time of such activity, *between such employee, his agent, or collective-bargaining representative and his employer;* * * *,'' (Emphasis ours.)

It should be noted that in the cases of *Fisch, et al.,* v. *General Motors Corporation* and *Bateman, et al.,* v. *Ford Motor Co., supra,* some of the parties had actually filed amendments, setting up and attempting to plead a cause of action under the contract between the United States Government and the defendants in those cases. The court said that Section 2 (a) of the Portal-to-Portal Act did not except such contract from its provisions.

There is a later case from the United States Court of Appeals for the Third Circuit—*Thomas, District Director, United States Steelworkers of America, et al.,* v. *Carnegie-Illinois Steel Corporation,* and fourteen other cases consolidated, 174 F. (2d) 711. The court in the body of the opinion, speaking through Judge GOODRICH, used this language:

"Counsel for the appellants in the *Moloney* case makes the point that his people are entitled to the benefits of the contract made between the employer and the United States in which the employer agreed to abide by all provisions of federal statutes affecting labor—pay, working conditions, etc. Counsel makes the point that this gives his clients rights based upon the contract in addition to rights under the statute. The point is not new. It was raised and answered unfavorably to the appellants' contention in *Fisch* v. *General Motors Corp.,* 169 F. (2d) 266 (C. C. A. 6, 1948), and

we agree with the answer there given. The judgments appealed from will be affirmed."

The proposed amendment to allege that the plaintiffs would be entitled to recover under the contract between the United States and the respondent is wholly without merit.

The United States Court of Appeals for the Tenth Circuit, in the case of *Simms* v. *Andrews, Deputy Collector of Internal Revenue, et al.*, 118 F. (2d) 803, speaking through Judge HUXMAN, used this language:

> "Amendment of pleadings to conform to proof is not authorized merely because evidence, which is competent and material upon issues created by the pleadings, incidentally tends to prove another fact not within the issues in the case."

The principle here announced is simple. In order for the trial court to commit reversible error in refusing to permit an amendment to conform to proof two elements must concur: *First*, the motion must be timely, that is, it must be made before a final disposition of the cause. In the instant case there was a dismissal for want of jurisdiction before amendment was attempted. *Second*, it must be made to conform to material proof which had been introduced without the issues, and over no objection that such proof is not within the issues made by the pleadings.

In the instant case we believe there is no merit to the argument that the denial of the proposed amendment of the trial judge was an abuse of discretion.

In the case of *Philip Manosky, et al.*, v. *Bethlehem-Hingham Shipyard, Inc.*, not yet officially reported, the United States District Court for the District of Massachusetts used the following language:

"In this action the latest amended complaint states clearly that the action is brought under the Fair Labor Standards Act of 1938, and under the Portal-to-Portal Act of 1947. In many cases decided by this Court it has been pointed out clearly that the Portal-to-Portal Act of 1947, 29 U. S. C. A., Secs. 216, 251, *et seq.*, which amended the Fair Labor Standards Act of 1938, withdrew from the courts jurisdiction of any action to recover overtime compensation for activity which was not compensable by either (*1*) an express provision of a written or nonwritten contract, or (*2*) a custom or practice at the employer's establishment at the time of such activity not inconsistent with a written or nonwritten contract.

* * * * * * * *

"Rule 8(a) of the Federal Rules of Civil Procedure provides that a claim for relief 'shall contain (*1*) a short and plain statement of the grounds upon which the court's jurisdiction depends.' Since the Portal-to-Portal Act withdraws the jurisdiction of this court except in the instance of an express contract or custom covering the activities complained of, it is encumbent upon the plaintiff to set forth clearly, concisely, and exactly, the specific contract or custom upon which they rely. * * *"

We respectfully submit that the original complaint, together with the amendment thereto and proposed amendment, stated no cause of action if the Portal-to-Portal Act of 1947 is constitutional. The motion to amend was fourteen days out of time after dismissal for want of jurisdiction. The trial court had no power to authorize the amendment without first vacating the order of dismissal. No such relief was sought by petitioner. If the trial court had had jurisdiction and the amendment had been permitted, no cause of action would have been stated; no litigious issues would have been raised by such pleadings. There was no

abuse of discretion by the trial court in this regard. This complaint of petitioner is without merit and constitutes no ground for certiorari.

III.

The Complaint and Amendments Thereto Fail to State Facts Sufficient to Constitute a Cause of Action Under Executive Order 9240.

It is submitted that Executive Order 9240 was intended solely as a directive to the various agencies of the Government to conform their war contracts to certain new labor standards which are set forth in the order.

The order does not by its terms confer any right of action upon anyone. Nor is there the slightest indication in any of the language used in the order that such was the intention of the President. The only provision of the order which relates to the manner in which the President intended that the new standards be enforced is contained in Section II, which provides:

> "II. All Federal Departments and agencies shall conform the provisions in all existing and future contracts negotiated, executed, or supervised by them to the policies of this order. All such departments and agencies shall immediately open negotiations to alter provisions in existing contracts to conform them to the requirements of this order."

The presence in the order of this specific direction to all Federal Departments and agencies to include in their contracts the policies of this order, and to open negotiations immediately to alter provisions in existing contracts, together with the absence of any other provision dealing with enforcement, indicates that the President believed that this particular aspect of compensation on work relating to the prosecution of the war could be reached only through

Federal contracts, and that it was never his intention to confer rights upon employees to sue their employer.

Paragraph V of the order provides that all Federal Departments and agencies affected by the order shall refer to the Secretary of Labor for determination of questions of interpretation and application arising thereunder. Pursuant to this section, the Secretary of Labor issued Interpretative Bulletin No. 1, setting forth his interpretations of the Executive Order. It is significant that this bulletin contains but one paragraph concerning the subject of enforcement. This paragraph reads as follows:

> "XI. *Enforcement.*
>
> "32. Paragraph II of the order directs all Federal Departments and agencies to conform the provisions in all existing and future contracts negotiated, executed, or supervised by them to the policies and requirements of the order. The various contracting agencies of the Government will refuse to reimburse contractors for payments made contrary to the provisions of the order."

It seems clear in the first instance that the President would have made specific provision for employee suits had he intended to confer such rights upon employees. It seems doubly clear that the Secretary of Labor might have made some mention in her Interpretative Bulletin No. 1 of the rights of employees to sue or to take other action had there been the slightest ground for so construing the executive order.

It is also seen that it was contemplated that this order would be enforced by the Executive Department through its own departments and agencies without recourse to the courts. It was urged upon the courts of New York in *Steiner* v. *Pleasantville Constructors, Inc.,* (N. Y. Sup. Ct. 1944)

49 N. Y. Supp. (2d) 42, 8 Labor Cases 62,324, that Executive Order 9240 supported such a claim as is here made by the petitioners, and the trial court responded by giving double time compensation. Upon appeal, however, this element of judgment was set aside, and the New York Supreme Court stated very definitely that Executive Order 9240 is not binding upon the defendant employer. Executive Order 9240 is similar to the Walsh-Healey Act in that neither measure confers any right of action upon employees themselves.

In *Greenstein* v. *Pan American Airways, Inc.*, (N. Y. Sup. Ct. 1945) 10 Labor Cases 62,721, plaintiff sought to recover unpaid overtime compensation under the Walsh-Healey Act. The court granted defendant's motion to dismiss, stating:

> "A reading of the Walsh-Healey Public Contracts Act indicates that it is inapplicable to and unenforceable by the plaintiff. The Act does not purport to make the employer liable to the employee for a failure to pay overtime rates for overtime work. It only prescribes an administrative procedure whereby funds may be withheld by the United States from sums due the employer and thereafter paid, if claim therefor is timely made to the employee (Title 41, U. S. C., Sec. 36). No right is given an employee to bring suit against his employer under this Act. None of the statutory provisions referred to in that Act provides a basis for a suit by plaintiff or any other employee to recover compensation from the employer for the alleged overtime work."

Similarly, Executive Order 9240 does not purport to make the employer liable to the employee for a failure to pay overtime. It merely directs that Government agencies shall incorporate certain provisions in their future contracts and shall immediately modify their existing contracts.

Petitioner contends that Executive Order 9240 creates an enforceable requirement that a premium wage be paid for the seventh consecutive day of work on the part of any employee. Such a contention can be supported, however, only if power to issue such an order has been delegated to the President by either the Constitution or statute.

The President recited his authority in Executive Order 9240 as "the authority vested in me by the Constitution and the statutes, as President of the United States and as Commander-in-Chief of the Army and Navy."

It is not stated that any specific Act of Congress authorized the issuance of the order. If the order is merely a directive by the President to Federal Departments and agencies directing or requiring them to conform the provisions in their contracts to the policies of the order, as respondent strongly believes it is, then there is no wish to question the authority of the President to issue it. In the case at bar, however, the claims are based upon the theory that the order is to be construed as requiring the defendant to pay plaintiffs premium wages, and as authorizing plaintiffs to sue respondent if such premium wages were not paid. In the event that this Court agrees with such a construction of the order it is the position of the respondent that the order is without statutory or consitutional authority.

A careful search has been made of the Acts of Congress which petitioner might contend authorize the President to issue the executive order in question. The only provision which has been found in any Act of Congress which relates to the subject-matter of the order is Section 956 of the Stabilization Act of 1942, enacted on October 2, 1942. (56 Stats. 765, Title 50, U. S. C., Appendix, Secs. 961-971.) While this Act became law some days after the promulga-

tion of Executive Order 9240 it is suspected that Section 965 of this Act may have been an attempt to provide statutory authority for the order. This section provides:

"965. *Wages and salaries; prohibition of violation of regulations; employer's reduction of salaries over $5,000; regulation of payment of double time.*

"(*a*) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

"(*b*) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of $5,000 or more per annum.

"(*c*) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week. Oct. 2, 1942, c. 578, Sec. 5, 56 Stat. 767."

Aside from the problem as to whether the Stabilization Act is to be considered as ratifying an executive order previously issued, it is perfectly clear that subsection (c) of Section 965 of the Act did not authorize the issuance of Executive Order 9240 if petitioner's construction of it is a proper one. This subsection authorizes the President to limit or prohibit the payment of double time except under certain circumstances. It does not authorize the President to require the payment of double time either under the

circumstances mentioned or under other circumstances. By no stretch of the imagination can it be said that it authorizes the President to confer a right of action upon anyone to sue for double time.

If Section 965 of the Stabilization Act is the statutory authority for Executive Order 9240, it seems clear that the order, construed as petitioner would have the Court construe it, goes beyond the delegation of authority made by Congress to the President and to that extent is void. As was said by the Supreme Court in *Utah Power and Light Co.* v. *United States,* 243 U. S. 389, at page 410:

> "If any of the regulations go beyond what Congress can authorize, or go beyond what it has authorized, those regulations are void and may be disregarded * * *."

As far as can be determined, there is no statutory authority for Executive Order 9240, if it is to be construed as petitioner would have the Court construe it. The final question, then, is whether there is any constitutional authority for its issuance.

As is well known, the Constitution vests the executive power in the President and the legislative power in Congress. There can be little question that Executive Order 9240, construed according to petitioner's theory, is legislative. If this order requires the payment of double time by employers to employees, and authorizes employees to sue for double time if it is not paid, the order is just as legislative in character as the Fair Labor Standards Act. See *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 146. This being the case, clearly the President was without constitutional authority to issue the order as chief executive.

Article II, Section 2, Clause 1 of the Constitution

makes the President the Commander-in-Chief of the Army and Navy, but he is not authorized to exercise legislative power in that capacity. See *O'Neal* v. *United States,* (C. C. A. 6, 1944) 140 F. (2d) 908, 911, where the court said:

> "While the war power in this country is conferred on the Congress and on the President * * *, the principal war power of the President arises as Commander-in-Chief of the Army and Navy and does not include any war power legislative in its nature."

It is submitted that Executive Order 9240, construed as petitioner asserts it should be construed, was without doubt outside and beyond the authority of the President and therefore invalid.

IV.

Executive Order No. 9240 Conferred No Jurisdiction on the United States District Courts to Adjudicate Claims Based Thereon.

No cause of action could be based upon the violation of Executive Order No. 9240. It has been held that the District Courts of the United States have no jurisdiction to adjudicate claims based on Executive Order No. 9240. In the case of *McDaniel, et al.,* v. *Brown & Root, Inc.,* 172 F. (2d) 466, speaking through Chief Judge PHILLIPS, the court used this language:

> "We agree with the conclusion of the Eighth Circuit in *Crabb* v. *Weldon Bros.,* 164 F. (2d) 797, 803, that the District Courts are without jurisdiction to adjudicate claims based on Executive Order No. 9240, 40 U. S. C. A., Sec. 326, note. See also *Sweel* v. *B. F. Goodrich Co.,* D. C. N. D., Ohio, 68 F. Supp. 782, and *Jesse* v. *Tenn. Eastman Corp.,* 14 Labor Cases, Par. 64,540 (1948, Tenn.), May 6, 1948."

In *conclusion,* it is respectfully submitted that the Portal-to-Portal Act of 1947 is constitutional; that there is no merit to any contention raised by petitioner; that the petition for certiorari is wholly without merit and should be denied.

PETER B. COLLINS,
Wilmington, Delaware,
G. C. SPILLERS,
Tulsa, Oklahoma,
G. C. SPILLERS, JR.,
Tulsa, Oklahoma,
Attorneys for Respondent.

APPENDIX A.

United States Court of Appeals, Tenth Circuit.
May Term, 1949.

Grace W. Adkins, as Administratrix of the Estate of P. V. Adkins, Deceased, Appellant, *vs.* E. I. du Pont de Nemours & Company, Inc., Appellee, United States of America, Intervener.—Number 3866.

Appeal From the United States District Court for the Northern District of Oklahoma.

John W. Porter, Jr., for Appellant,

Peter B. Collins, and Spillers and Spillers, for Appellee,

Before PHILLIPS, Chief Judge, and BRATTON and HUXMAN, Circuit Judges,

HUXMAN, Circuit Judge, delivered the opinion of the court.

On May 17, 1946, P. V. Adkins, for himself and twelve other employees of E. I. du Pont de Nemours & Company, hereinafter referred to as DuPont, instituted this action against the company to recover overtime compenstion, damages, and attorneys' fees, under the Fair Labor Standards Act, 29 U. S. C. A., Paragraph 201, *et seq.*, and Executive Order Number 9240, as amended, 40 U. S. C. A., following Section 326. Adkins subsequently died and the action was reviewed in the name of Grace W. Adkins, as administratrix of his estate.

An amended complaint was filed, an answer was filed thereto, and issues were made up. A special master was appointed who held hearings and submitted proposed findings of fact, conclusions of law, and made recommendations. He recommended that the claims be denied on the ground of *de minimus non curat lex.* Exceptions were filed by both parties. While the case was thus pending, the Act of May 14, 1947, 29 U. S. C. A., Paragraph 251, *et seq.*, commonly referred to as the Portal-to-Portal Act, was passed and became the law.

Thereafter, DuPont filed an amendment to its answer, pleading the Portal-to-Portal Act as a defense.[1] When plaintiffs challenged the constitutionality of the Act, the Government intervened in the suit. The constitutional question was briefed and argued, and on September 24, 1947, the trial court upheld its constitutionality, concluded it had no jurisdiction, and, therefore, refused to consider the Master's recommended findings of fact and conclusions of law, and dismissed the action for want of jurisdiction. On October 3, following, plaintiffs filed a motion for a new trial, and on October 8, filed a motion for leave to amend the complaint to conform to the evidence by alleging, in effect, that the contract between the Government and DuPont was executed for their use and benefit. They asked that the complaint be further amended to allege: "* * * that said defendant agreed and contracted to pay said employees for all time during which an employee was required by said defendant to be at duty, or to be on the employer's (defendant's) premises, or to be at a prescribed work place, and also, where baths were required, that time consumed bathing and changing clothes was compensatable." The purpose of this proposed amendment was to bring plaintiff's

1. The pertinent portions of the Act are as follows: "252 (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or * * *."

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

claims within the exception of Section 252 (a) (1) of the Portal-to-Portal Act. The trial court denied the right to amend on the ground that the motion came too late. Judgment dismissing plaintiff's cause of action for lack of jurisdiction was entered and this appeal followed.

Appellants in this court challenge the action of the trial court upholding the constitutionality of the Portal-to-Portal Act. In the recent case of *McDaniel* v. *Brown & Root*, 172 F. (2d) 466, in line with other courts, we upheld the constitutionality of the Act and we adhere to the decision reached in that case.[2]

Error is also assigned upon the court's ruling dismissing the action for want of jurisdiction; its refusal to consider the case upon its merits; to determine the issues; and from its refusal to find that the time for which recovery was sought was compensable by express provisions of a written contract or a nonwritten contract within the meaning of Section 252 (a) (1).

The cause of action pleaded in the original and amended complaints, on file at the time the court decided the case, was for the recovery of overtime compensation, damages, and attorneys' fees under the Fair Labor Standards Act. Admittedly, the activities for which overtime pay was sought were activities which were preliminary to and postliminary to the principal activities for which the plaintffs were employed by DuPont. In substance, plaintiffs sought to recover overtime pay for that period of time consumed by them in leaving the vehicle by which they came to the premises, and going to the place where they checked in and began their regular activities, and likewise for the time consumed after they checked out and while they were returning to the place where they again obtained their transportation back to their place of residence. In general, they al-

2. For other cases upholding the constitutionality of the Act, see Fisch v. General Motors Corporation, 169 F. (2d) 266; Thomas v. Carnegie-Illinois Steel Corp., decided March 15, 1949.

leged that the time consumed in these activities before and after shift time amounted to at least one hour per day.

Nowhere in the amended complaint on file at the time judgment was entered was there any allegation that there was a written or oral contract in force between appellants and DuPont providing for payment for this preliminary and postliminary time. It follows, therefore, from the admitted allegation of the amended complaint that the time for which compensation was sought did not fall within the exception of Section 252 (a) (1) of the Portal-to-Portal Act, and was, therefore, not compensable under Section 252 (a), and that Section 252 (d) deprived the trial court of jurisdiction of the asserted cause of action.

Appellants urge that the trial court erred in refusing permission to amend the complaint to conform to the proof by alleging that the contract between the Government and DuPont was executed for their use and benefit.[3] The application to amend to conform to the proof was not made until October 8, 14 days after the court had dismissed the case. Amendments, after judgment, rest in the sound discretion of the trial court and may be properly denied when the moving party has been guilty of delay.[4]

We cannot say that the trial court abused its discretion in denying the right to amend, 14 days after judgment. But in any event, the court ruled correctly on the motion even if such motion be considered on its merits. Appellant sought to amend by alleging that the contract between DuPont and the Government was made for their benefit. In this way they sought to bring themselves within the saving provisions of Section 252 (a) (1) of the Portal-to-Portal Act. It has been held, without exception, that contracts such

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3. This contract contained provisions with respect to minimum wages and maximum hours and provided penalties for the violation thereof.

4. Maryland Casualty Co. v. Hosmer, 93 F. (2d) 365; Baker v. Barber Asphalt Paving Co., 92 Fed. 117; Alder v. Druidis, 170 P. (2d) 515; Moneta v. Hoinacki, 67 N. E. (2d) 204; Vaillancourt v. Dutton, 50 Atl. (2d) 762.

as the one in this case, are not contracts for the benefit of the employees so as to bring their services within the saving provisions of the Act.[5] So, also, in so far as the amendment sought to plead a contract between the employees and DuPont, it was wholly insufficient. There is no evidence in the record before this Court which would support an allegation that there was an express agreement, either written or oral, between the employees and DuPont, providing for compensation for these preliminary and postliminary services. While appellants complain that the trial court erred in refusing to send up the entire record (the appeal being *in forma pauperis*), the court afforded them full opportunity to designate all parts of the record material to this, as well as to other issues in the case.

Since the court was without jurisdiction of the cause, there was no occasion for it to consider the case upon its merits and determine the issues presented by the master's recommended findings of fact and conclusions of law.

By supplemental brief, appellee for the first time raises the contention that appellants' rights are governed by the Walsh-Healey Public Contracts Act, 41 U. S. C. A., Paragraph 35, *et seq.*, rather than by the provisions of the Fair Labor Standards Act, and that under that Act they may not themselves maintain this action. The recent case of *U. S. Cartridge Company* v. *Powell*, decided April 12, 1949, is relied upon to sustain this contention.

The Administrator of the Wage and Hour and Public Contracts Division of the United States Department of Labor was granted permission to appear as *amicus curiae* and file a brief. He takes the position that the provisions of the two acts can be harmonized in their relation to appellants' rights and that both have application. But since the case in its inception was pitched squarely on the Fair Labor Standards Act and after the passage of the Portal-

5. Fisch v. General Motors Corporation, supra; Thomas v. Carnegie-Illinois Steel Corporation, supra.

to-Portal Act on the saving provisions of the latter act and was tried and disposed of on that theory, it is not necessary to explore and pass upon these new contentions advanced for the first time in this court.

Affirmed.